Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BONNEVILLE ASSOCIATES, LIMITED PARTNERSHIP, and MACHAN HAMPSHIRE PROPERTIES, LTD.,

Petitioners,

v.

DAVID J. BARRAM, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should a unilateral administrative agency decision that requires a party to pay $5.2 million to the administrative agency be allowed to go unchallenged without a hearing on the merits because of the use of a legal fiction?

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Petitioners, Bonneville Associates, Limited Partnership and Machan Hampshire Properties, Ltd. ("Bonneville"), respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit in *Bonneville Associates, Limited Partnership and Machan Hampshire Properties, Ltd. v. David J. Barram, Administrator, General Services Administration*, (No. 96-1325, decided January 20, 1999) is not yet reported. (App. A). The opinion of the General Services Administration Board of Contract Appeals in *Bonneville Associates, Limited Partnership & Machen Hampshire Properties, Ltd.*, GSBCA 13134 (11595) — REIN is reported at 96-1 B.C.A. § 28,122.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit ("Court of Appeals") was entered on January 20, 1999. (App. B). No petition for rehearing was filed by Bonneville. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

In the court of first instance, Bonneville appealed to the Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. § 1295(a)(10).

STATUTORY PROVISIONS AND RULES INVOLVED

The Contract Disputes Act of 1978, Pub. L. No. 95-563 92 Stat. 2383, codified as amended at 41 U.S.C. §§ 601-613 ("CDA") provides in relevant part that a final decision of the contracting officer can be appealed to the Board of Contract Appeals within 90 days of receiving the decision or, instead, suit can be brought in the United States Claims Court (now the Court of Federal Claims and hereinafter referred to as such) within one year of such receipt.

The Rules of the Board of Contract Appeals, General Services Administration ("Board") when Bonneville dismissed its appeal in 1992 provided in relevant part:

> Rule 28(a): "Voluntary Dismissal"
>
> (1) Upon motion of the appellant or by stipulation of the parties, a case may be dismissed by the Board. Unless otherwise stated in the appellant's motion or in the stipulation, the dismissal is without prejudice, except that such dismissal operates as an adjudication upon the merits when requested by an appellant whose case based on or including the same claim has previously been dismissed by the Board.
>
> (2) When a case has been dismissed without prejudice and has not been reinstated by the Board upon application of any party within three years of the date of dismissal, or within such shorter period as the Board may

> prescribe, the case shall be deemed to have been dismissed with prejudice as of the expiration of the applicable period.

48 C.F.R. § 6101.28(a) (1991).

> Rule 27(c), captioned "Dismissal In Lieu Of Stay Or Suspension,"
>
> When circumstances beyond the control of the Board prevent the continuation of proceedings in a case, the Board may, in lieu of issuing an order suspending proceedings, dismiss the case without prejudice to reinstatement. Such a dismissal may require reinstatement by a date certain or within a certain period of time after the occurrence of a specified event. If the order of dismissal does not otherwise provide, it will be subject to the provisions of 6101.28(a) [Rule 28].

48 C.F.R. § 61-1.27(c) (1991).

STATEMENT OF THE CASE

On September 30, 1987, the General Services Administration ("GSA") purchased from Bonneville an office building in Las Vegas, Nevada. Bonneville was paid $9,908,452, with approximately $2.3 million of the sale price withheld for building improvements and the retrofitting of certain listed items.

Following the sale, a dispute arose between Bonneville and GSA regarding the building's floor load capacity and the operating capacity of the heating, ventilation, and air

conditioning ("HVAC") units. The parties negotiated for four years but were unable to resolve the dispute. Then GSA's contracting officer, on August 21, 1991, issued a final decision in accordance with the CDA demanding $5,195,069 from Bonneville in order to pay for the estimated costs of correcting these alleged building deficiencies. (App. G). In the final decision, the contracting officer informed Bonneville that his determination could be appealed to either the Board within 90 days, or the Court of Federal Claims within one year of receipt. (App. G at 55a-56a).

On November 19, 1991, Bonneville timely appealed the contracting officer's final decision to the Board. (App. F). The Board, on November 26, 1991, docketed the appeal and issued an order to the parties, requiring, among other things, that Bonneville submit its complaint on or before January 6, 1992. However, on January 6, 1992, Bonneville instead submitted a "Withdrawal of Notice of Appeal," (App. E) in which it stated that Bonneville

> . . . hereby withdraw[s] the Notice of Appeal to the final decision of [the contracting officer] issued on August 21, 1991 and received on August 26, 1991. Bonneville Associates *et al.* will pursue its appeal in the U.S. Claims Court.

(App. E at 47a).

The Board, on January 17, 1992, granted Bonneville's request and, pursuant to GSBCA Rule 28(a)(1), dismissed the appeal without prejudice. (App. D).

Concurrently, on January 13, 1992, Bonneville filed its complaint with the Court of Federal Claims. In response, the

Government moved to dismiss the complaint upon the grounds that Bonneville's election to submit a notice of appeal to the Board deprived the Court of Federal Claims of jurisdiction to hear Bonneville's action. The Government argued that, pursuant to the CDA, once a contractor selects a forum with jurisdiction to entertain its claims, *i.e.*, the court or the appropriate board of contract appeals, the "Election Doctrine" precludes subsequent review by the other tribunal.

Bonneville, in contrast, argued that the Election Doctrine was not applicable, because the Board lacked jurisdiction to entertain its appeal since the dispute arose from a contract for the sale of real estate not subject to the CDA's dispute resolution procedures. The Court of Federal Claims, in granting the motion to dismiss concluded that Bonneville's claim arose under a contract for repair and alteration of real property, and therefore was within the scope of the CDA. Therefore the Court of Federal Claims found that because the Board possessed jurisdiction to entertain Bonneville's claims, the Election Doctrine precluded its exercise of jurisdiction. *Bonneville Assocs. v. United States*, 30 Fed. Cl. 85 (1993). Bonneville appealed this dismissal to the United States Court of Appeals for the Federal Circuit.

On December 19, 1994, the Court of Appeals affirmed, noting that the Election Doctrine limited prosecution of Bonneville's claim to the first tribunal possessing jurisdiction, *i.e.*, the Board. *Bonneville Assocs. v. United States*, 43 F.3d 649 (Fed. Cir. 1994). According to the Court of Appeals, Bonneville incorrectly concluded that the Board lacked authority to entertain its claims; therefore, the Election Doctrine was applicable.

On December 29, 1994, Bonneville sought to reinstate its previously dismissed appeal and again submitted to the Board a notice of appeal from the contracting officer's August 21, 1991, decision. In its notice, Bonneville requested that the Board reinstate the appeal pursuant to Rule 28(a)(2). In response, GSA requested that the Board dismiss the appeal as untimely because reinstatement of a previously dismissed appeal after expiration of the CDA's 90-day deadline was barred. Bonneville countered that its second notice of appeal did not constitute a new action, but merely a revival of the previous appeal that was dismissed without prejudice and that pursuant to Board Rule 28(a)(2) its appeal should be reinstated since it was within 3 years of the dismissal.

In a split-decision, a majority of the Board granted GSA's motion to dismiss because the time limitations contained within the CDA did not permit reinstatement of a previously dismissed appeal after their expiration, *i.e.*, 90 days after receipt of the contracting officer's final decison. According to the majority,

> because Bonneville voluntarily caused its appeal to be dismissed without prejudice in order to pursue the appeal in another forum, Bonneville is placed in the same position as if the first appeal had never been filed. The second filing does not relate back to the date of the first filing. Moreover, as the second complaint filed on December 29, 1994 is a "new appeal" filed after the expiration of the CDA ninety-day time limit, it is untimely.

The dissent, however, argued that the Board should have found that a dismissal without prejudice which contemplates further proceedings does not terminate the litigation or, in

the alternative, the Board should have viewed the original motion for withdrawal as a request to stay proceedings while Bonneville prosecuted its claims in the Court of Federal Claims.

Bonneville appealed the Board's decision to the United States Court of Appeals for the Federal Circuit arguing that the Board had the discretionary authority to reinstate the appeal and it should have done this. Also, Bonneville argued that the statute of limitations should be equitably tolled. On January 20, 1999, that Court affirmed the Board's decision not to reinstate Bonneville's appeal. The Court of Appeals stated:

> We cannot say that the Board's decision to treat Bonneville's simple dismissal without prejudice the same way the federal courts would have treated it was plainly erroneous. Nor can we say that this decision was inconsistent with its rules — Rule 27(c) deals with dismissals in lieu of suspension, not simple dismissals like Bonneville's, and Rule 28(a)(2), as shown above, merely places an outer limit on the time within which a litigant may seek to reinstate an appeal that was dismissed without prejudice. The Board has substantial discretion to determine whether to reinstate an appeal voluntarily dismissed without prejudice and it did not abuse that discretion here in denying reinstatement.

REASONS FOR GRANTING THE WRIT

I.

A LEGAL FICTION SHOULD NOT BE THE BASIS FOR DENYING BONNEVILLE A HEARING ON THE MERITS.

Bonneville should not be denied a hearing on the merits of its appeal of a contracting officer's decision requiring the payment of $5.19 million to the government because of a legal fiction, *i.e.*, that Bonneville never filed its appeal with the Board. Judge Daniels, Chairman of the GSBCA, in his dissent articulated this argument as follows:

> As this history shows, Bonneville has now been told by both the Court of Federal Claims (the Claims Court's current name) and the Court of Appeals, that the Claims Court had no jurisdiction to hear the case because an appeal had previously been filed at this Board, which had the power to hear it. If these two courts had been willing to accept the legal fiction that our dismissal without prejudice left Bonneville's appeal as if it had never been made, they would have had to hold that the Claims Court had jurisdiction over the suit filed there, since that filing would have been the first and only election of forum by the contractor.
>
> Applying the fiction puts Bonneville in a Catch-22 situation: The two courts say the Claims Court had no jurisdiction to get to the merits of the case because the contractor filed here first, but my colleagues say the Board has no jurisdiction

> because Bonneville effectively never filed here until recently. Thus, the contractor will have no opportunity for review of the merits of the contracting officer's decision, even though it filed with both the Claims Court and the Board within the time limits set out in statute and noted in the decision. The substance of the fiction thus becomes of ultimate consequence, and application of it would cause irreparable injury to the appellant by preventing that party from having the merits of its case heard. A more reasonable solution to this predicament would be to resolve the situation by taking into account the facts that (a) Bonneville did file its notice of appeal with us in a timely fashion and (b) at all relevant times, the contractor has been attempting to litigate its claim before a proper forum.

(App. C at 42a).

The Court of Appeals believed this conclusion was unfounded, since

> [T]he rule merely states the consequences of a voluntary dismissal without prejudice, namely, that the appellant cannot thereafter resurrect the appeal after the statute of limitations on the cause of action has run.

(App. A at 10a). Bonneville disagrees. Legal fictions are founded equity, and are wrongful if they work loss or injury to anyone. *Louisville & Nashville R. Co. v. Public Service Comm'n of Tennessee*, 389 F.2d 247, 250 n.1 (1968) (citing 3 William Blackstone, commentaries 1553 (W.C. Jones, ed.).

Moreover, the Board, as the Court of Appeals recognized, did not have ". . . to treat Bonneville's simple dismissal without prejudice the same way federal courts would have treated it . . ." (App. A at 9a); however, for reasons not stated the Board elected to do this. The adverse effect of this discretionary act compounded the effect of the Board's earlier discretionary decision to treat Bonneville's motion to withdraw its appeal as a dismissal under Board Rule 28(a)(1) rather than a suspension under Rule 27(c).

II.

EQUITY DEMANDS THAT THE STATUTE OF LIMITATIONS BE TOLLED.

Even if the Court of Appeals correctly concluded that the Board did not abuse its discretion when it ruled that the attempted reinstatement of Bonneville's appeal to the Board was untimely, the 90-day limitations period in the Contract Disputes Act should be equitably tolled. The Court of Appeals, without deciding whether equitable tolling applies to the time limitations in the Contract Disputes Act (App. A at 11a), rejected this argument because it found that "[W]hat happened here falls far short of the situations in which equitable tolling has been applied." (App. A at 12a). The Court of Appeals is incorrect.

In the first instance, equitable tolling does apply to the Contract Disputes Act. This Court in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990) addressed the issue of statutorily imposed time limits in suits against the Federal Government and stated:

> A waiver of sovereign immunity " 'cannot be implied but must be unequivocally expressed.' " *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)). Once Congress has made such a waiver, we think that making the rule of equitable tolling applicable to suits against the Government, in the same was that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver. Such a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation. We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so.

In a concurring opinion, *Id.* at 97, Justice White stated

> The Court, however, holds that like statutes of limitations for suits between private litigants, limitations periods for suits against the Government will now presumptively be subject to equitable tolling.

Subsequently, in *United States v. Brockamp*, 519 U.S. 847 (1996) the Court concluded that Congress did not intend the equitable tolling doctrine to apply to the time to file a claim for a tax refund under section 6511 of the Internal Revenue Code of 1986 (26 U.S.C.A. § 6511). In reaching that conclusion this Court relied on many facts that are distinguishable from Bonneville's situation; for example, the Court noted

> Section 6511 sets forth its time limitations in unusually emphatic form. Ordinarily limitations statutes use fairly simple language, which one can often plausibly read as containing an implied "equitable tolling" exception. *See e.g.*, 42 U.S.C. § 2000e-16(c) (requiring suit for employment discrimination to be filed "[w]ithin 90 days of receipt of notice of final [EEOC] action . . .").

Id. at 851.

By contrast, the CDA's limitations statute uses "fairly simple language" which one can plausibly read as containing an implied equitable tolling exception. Also, reading an equitable tolling provision into the CDA would not cause a "linguistic havoc" or require "substantive limitations on the amount of recovery" or "create serious administrative problems" or create any of the other concerns expressed by the Court in *Brockamp*. Finally, while this Court in *Brockamp* noted "[T]ax law, after all, is not normally characterized by case specific exceptions reflecting individual equities", (*Id.* at 852), the CDA recognizes that equitable principles (*e.g.*, requests for equitable adjustments) should apply to government contract law.

Second, Bonnneville did act with due diligence. Within 90 days of receipt of the contracting officer's decision, Bonneville timely appealed to the Board. At the time of voluntarily dismissing the Board action, Bonneville immediately commenced an action before the Court of Federal Claims. When the Court of Appeals affirmed the Court of Federal Claim's dismissal of Bonneville's action, Bonneville immediately sought to reinstate its appeal before the Board. The Court of Appeals, however, finds that Bonnneville should

not receive equitable relief even if available because (1) Bonneville should have done more when it dismissed its appeal and (2) no third party including the Government misled or otherwise impaired Bonneville. Bonneville submits that the Court of Appeals view of when equitable relief should be granted is too narrow.

CONCLUSION

Bonneville respectfully requests that the Court grant this petition.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DECIDED JANUARY 20, 1999

United States Court of Appeals for the Federal Circuit

96-1325

BONNEVILLE ASSOCIATES, LIMITED PARTNERSHIP, and MACHAN HAMPSHIRE PROPERTIES, LTD,

Appellants,

v.

DAVID J. BARRAM, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION,

Appellee.

DECIDED: JANUARY 20, 1999

Before BRYSON, *Circuit Judge*, FRIEDMAN, *Senior Circuit Judge*, and GAJARSA, *Circuit Judge*.

Opinion for the court filed by *Senior Circuit Judge* FRIEDMAN, in which *Circuit Judge* BRYSON joins. Concurring opinion filed by *Circuit Judge* GAJARSA.

FRIEDMAN, *Senior Circuit Judge*.

This appeal challenges the General Services Administration Board of Contract Appeals' (Board's) dismissal of the appellants' appeal from a contracting officer's

decision. The appellants previously had withdrawn their appeal to the Board to pursue their appeal to the United States Claims Court; the Board dismissed that appeal without prejudice. The United States Claims Court held that it lacked jurisdiction because the appellants' filing of their appeal with the Board constituted an election of remedies. After this court affirmed that ruling, the appellants attempted to reinstitute their appeal to the Board, which dismissed it as untimely because not filed within the 90-day limitations period under the Contract Disputes Act. We affirm.

I

The facts are undisputed. The appellant Bonneville Associates, Limited Partnership (the other appellant, Machan Hampshire Properties, Ltd., was one of Bonneville's general partners, but now has no role in this case) sold an office building to the General Services Administration and agreed to make substantial repairs and alterations to the structure. Disputes arose over whether Bonneville properly had made those repairs and alterations. After four years of negotiations, the contracting officer on August 21, 1991 issued a written decision seeking $5.195 million from Bonneville for the cost of correcting the deficiencies. The contracting officer's letter informed Bonneville that it could appeal to the Board within 90 days of receiving the decision or "instead" could bring suit in the United States Claims Court within one year of such receipt.

On November 19, 1991, 90 days after receipt of the decision, Bonneville filed a notice of appeal with the Board. On January 8, 1992, before anything further had been filed,

Bonneville "withdr[e]w" its notice of appeal, stating that it "will pursue its appeal in the U.S. Claims Court." It did not request that the termination of its appeal be without prejudice. The Board dismissed the appeal. Its order stated that "appellant filed a motion to withdraw the appeal filed at this Board so that it may pursue an appeal in the United States Claims Court instead," and that "[a]ccordingly, this appeal is DISMISSED WITHOUT PREJUDICE. Rule 28(a)(1)."

In January 1992, shortly before the Board dismissed the appeal, Bonneville filed suit in the United States Claims Court (now the Court of Federal Claims and hereinafter referred to as such) challenging the contracting officer's decision. On the government's motion the Court of Federal Claims dismissed this suit for lack of jurisdiction, holding that the filing of the appeal to the Board constituted an election of remedies that barred Bonneville from subsequently invoking the court's jurisdiction. *Bonneville Assocs. v. United States*, 30 Fed. Cl. 85, 88 (1993).

This court affirmed. *Bonneville Assocs. v. United States*, 43 F.3d 649 (1994). The court pointed out that for the election-of-remedies doctrine to apply the Board must have had jurisdiction over Bonneville's appeal, which it stated was "[t]he pivotal question here." *Id.* at 653. Bonneville contended that the Board had no jurisdiction because the Contract Disputes Act excluded from Board jurisdiction contracts for "the procurement of . . . real property in being." 41 U.S.C. § 602(a)(1) (1994). The government pointed to section 602(a)(3), which gives the Board jurisdiction over contracts for "the procurement of . . . alteration [or] repairs . . . of real property." The court concluded that "the contract was *both*

for the procurement and repair/alteration of real property." *Bonneville*, 43 F.3d at 654 (emphasis in original). The court held: "The board had jurisdiction over Bonneville's appeal because the dispute between the parties concerned Bonneville's alleged breach of its duty under the warranty clause and other contract provisions to repair and alter the conveyed building [and therefore] the Court of Federal Claims properly applied the Election Doctrine to dismiss Bonneville's action without prejudice for lack of subject matter jurisdiction." *Id.* at 655.

Ten days after that decision, Bonneville sought to reinstate its appeal to the Board pursuant to Rule 28(a)(2) of the Board's rules. When Bonneville dismissed its appeal in 1992, that provision (discussed below) stated that the dismissal of an appeal without prejudice would be deemed to have been dismissed with prejudice if the appeal was not reinstated within three years or any shorter period the Board had prescribed. Bonneville contended that it was entitled to reinstate its appeal because it sought to do so within three years of the dismissal.

A divided Board disagreed. The Board applied the same principle that the federal courts had applied in construing the similar provision governing voluntary dismissals without prejudice in Federal Rule of Civil Procedure 41(a), namely, that an appeal so dismissed "leaves the situation as if the suit had never been brought." Noting that the 90-day period for appealing was jurisdictional, the Board concluded:

> Accordingly, because Bonneville voluntarily caused its appeal to be dismissed without prejudice

> in order to pursue the appeal in another forum, Bonneville is placed in the same position as if the first appeal had never been filed. The second filing does not relate back to the date of the first filing. Moreover, as the second complaint filed on December 29, 1994 is a "new appeal" filed after the expiration of the CDA ninety-day time limit, it is untimely. We lack jurisdiction to hear this appeal.

Chairman Daniels, dissenting, stated that the Board's position was "built on a legal fiction — that Bonneville never brought this case to us before it filed its motion for reinstatement." Chairman Daniels suggested that "[a] more reasonable solution to this predicament would be to resolve the situation by taking into account the facts that (a) Bonneville did file its notice of appeal with us in a timely fashion and (b) at all relevant times, the contractor has been attempting to litigate its claim before a proper forum." Hestated that this could be accomplished either by viewing the prior dismissal without prejudice as one "which contemplate[d] further proceedings [and therefore] does not terminate the litigation," or by "convert[ing] the dismissal to a stay, *nunc pro tunc*, and then lift[ing] that stay so that the case might now be heard."

II

A. When Bonneville dismissed its appeal in 1992, three provisions of the Board's rules dealt with dismissal without prejudice. Rule 28(a), captioned "Voluntary Dismissal," provided:

> (1) Upon motion of the appellant or by stipulation of the parties, a case may be dismissed by the Board. Unless otherwise stated in the appellant's motion or in the stipulation, the dismissal is without prejudice, except that such dismissal operates as an adjudication upon the merits when requested by an appellant whose case based on or including the same claim has previously been dismissed by the Board.
>
> (2) When a case has been dismissed without prejudice and has not been reinstated by the Board upon application of any party within three years of the date of dismissal, or within such shorter period as the Board may prescribe, the case shall be deemed to have been dismissed with prejudice as of the expiration of the applicable period.

48 C.F.R. § 6101.28(a) (1991).

Rule 27(b) stated that "[t]he Board may suspend proceedings in a case for good cause," and that the suspension order "will prescribe the duration of the suspension or the conditions on which it will expire." 48 C.F.R. § 6101.27(b). Rule 27(c), captioned "Dismissal in lieu of stay or suspension," stated:

> When circumstances beyond the control of the Board prevent the continuation of proceedings in a case, the Board may, in lieu of issuing an order suspending proceedings, dismiss the case without prejudice to reinstatement. Such a dismissal may

> require reinstatement by a date certain or within a certain period of time after the occurrence of a specified event. If the order of dismissal does not otherwise provide, it will be subject to the provisions of 6101.28(a) [Rule 28].

48 C.F.R. § 6101.27(c) (1991).

The Board's Rules thus distinguished between two types of dismissals without prejudice. The first, which Rule 28(a)(1) governed, was a voluntary dismissal by the appellant (or on stipulation of the parties). The second, which Rule 27(c) covered, dealt with the case where the Board ordinarily would suspend proceedings, but circumstances beyond its control prevented their continuation. Presumably, this provision was designed to cover situations where the suspension was likely to continue for a lengthy but indefinite time, such as the conduct of settlement negotiations or the completion of some other proceeding.

Bonneville's voluntary dismissal of its appeal in 1992 was within the first category. Nothing in the dismissal even suggested, much less indicated, that Bonneville might seek reinstatement of its appeal dependent upon the outcome of its Court of Federal Claims suit. The intention to file such a suit was the sole explanation Bonneville gave for dismissing its appeal. Since Bonneville had filed its appeal on the last day for doing so, the Board reasonably could have viewed the dismissal as indicating that the notice of appeal had been protective, and that upon further consideration Bonneville had decided to litigate its case in court rather than before the Board.

The Board accordingly properly treated Bonneville's voluntary dismissal of its appeal as governed by Rule 28(a)(1).

B. Bonneville contends that since its voluntary dismissal of its appeal was without prejudice under Rule 28(a)(1), Rule 28(a)(2) entitled it to reinstate its appeal at any time within three years of the dismissal, and that since it met that time limit, the Board erred in refusing to reinstate the appeal. Bonneville reads too much into the language of Rule 28(a)(2).

Rule 28(a)(2) provided only that if an appeal had not been reinstated within three years (or within a shorter time the Board fixed), the previous dismissal without prejudice would become with prejudice. The provision related to the time and circumstances under which a without prejudice dismissal became one with prejudice. Although it recognized that appeals might be reinstated, it did not specify or indicate the circumstances under which that could be done, except to provide a time frame for such action. Resort, therefore, must be had elsewhere to determine the effect of the voluntary dismissal of Bonneville's appeal without prejudice upon its subsequent endeavor to reinstitute that appeal.

In deciding that question, the Board looked to the treatment of the same issue by the federal courts under the similar provision of Federal Rule of Civil Procedure 41(a), which states that an action may be dismissed by the plaintiff without court order "by filing notice of dismissal" before the adverse party files an answer or moves for summary judgment, and that unless the notice provides otherwise "the dismissal is without prejudice." The rule in the federal courts

is that "[t]he effect of a voluntary dismissal without prejudice pursuant to Rule 41(a) 'is to render the proceedings a nullity and leave the parties as if the action had never been brought.' " *Williams v. Clarke*, 82 F.3d 270, 273 (8th Cir. 1996) (quoting *Smith v. Dowden*, 47 F.3d 940, 943 (8th Cir. 1995) and applying Rule 41(a) in the Habeas Corpus context). *See, e.g., Beck v. Caterpillar, Inc.*, 50 F.3d 405, 407 (7th Cir. 1995) ("While [plaintiff's] first lawsuit was filed within the limitations period, that suit was voluntarily dismissed pursuant to [Rule] 41(a), and is treated as if it had never been filed.").

We give considerable deference to the Board's interpretation of its operating rules and procedures and "that interpretation ordinarily will be accepted 'unless it is plainly erroneous or inconsistent with the regulation.' " *Data General v. Johnson*, 78 F.3d 1556, 1561 (Fed. Cir. 1996) (giving deference to agency's interpretation of its 10-day protest filing deadline). We cannot say that the Board's decision to treat Bonneville's simple dismissal without prejudice the same way the federal courts would have treated it was plainly erroneous. Nor can we say that this decision was inconsistent with its rules — Rule 27(c) deals with dismissals in lieu of suspension, not simple dismissals like Bonneville's, and Rule 28(a)(2), as shown above, merely places an outer limit on the time within which a litigant may seek to reinstate an appeal that was dismissed without prejudice. The Board has substantial discretion to determine whether to reinstate an appeal voluntarily dismissed without prejudice and it did not abuse that discretion here in denying reinstatement.

Although Bonneville criticizes the Board's rule as a legal fiction (as did the dissenting opinion of the Board), we think this conclusion is unfounded. The rule merely states the consequence of a voluntary dismissal without prejudice, namely, that the appellant cannot thereafter resurrect the appeal after the statute of limitations on the cause of action has run. Here, Bonneville's attempt to reinstate its appeal almost three years after the 90-day period for filing the appeal had run was untimely, and the Board properly refused to permit reinstatement of the appeal because of lack of jurisdiction to entertain it.

III

A. Bonneville contends that even if the Board correctly concluded that the attempted resurrection of its appeal was untimely, we should permit the appeal by equitably tolling the 90-day limitations period in the Contract Disputes Act. It relies primarily upon *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). In *Irwin*, the Court held that "the rule of equitable tolling [is] applicable to suits against the Government, in the same way that it is applicable to private suits," and ruled that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so." *Id.* at 95-96. The Court, however, declined to apply equitable tolling to save Irwin's case.

Irwin filed a civil rights suit against the government 44 days after his attorney's office had received a "right-to-sue" letter from the Equal Employment Opportunity Commission,

which was 14 days beyond the statutory 30-day limitation for filing such suit. Irwin stated that the notice had reached the attorney's office when the attorney was out of the country, and that the delay in filing should be excused for that reason because the suit was filed within 30 days of Irwin's personal receipt of notice. The Court declined to find equitable tolling because "the principles of equitable tolling described above do not extend to what is at best a garden variety claim of excusable neglect." *Id.* at 96.

B. This court has not decided whether equitable tolling applies to the time limitations in the Contract Disputes Act for challenging a contracting officer's decision. *See Wood-Ivey Sys. Corp. v. United States*, 4 F.3d 961, 964 n.4 (Fed. Cir. 1993); *Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1572 n.2 (Fed. Cir. 1994). We find it unnecessary to decide that issue here, however, for even if the doctrine applies, equitable tolling of the 90-day time limitation is unwarranted.

Equitable tolling of statutes of limitations has been "allowed . . . in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Irwin*, 498 U.S. at 96. *See also Bowden v. United States*, 106 F.3d 433, 438 (D.C. Cir. 1997) ("courts have excused parties, particularly those acting pro se, who make diligent but technically defective efforts to act within a

limitations period. . . . Like other courts, we have excused parties who were misled about the running of a limitations period, whether by an adversary's actions . . . by a government official's advice upon which they reasonably relied . . . or by inaccurate or ineffective notice from a government agency required to provide notice of the limitations period.") (citations omitted); *Wolin v. Smith Barney, Inc.*, 83 F.3d 847, 852 (7th Cir. 1996) ("Equitable tolling is invoked when the prospective plaintiff simply does not have and cannot with due diligence obtain information essential to bringing a suit.").

What happened here falls far short of the situations in which equitable tolling has been applied. This is not a case of a litigant who with due diligence endeavors to meet the statutory time deadline, but fails to do so because of some minor technical or inadvertent mistake. Here, to the contrary, Bonneville originally timely (but just) filed its notice of appeal with the Board. Six weeks later, however, Bonneville, represented by counsel, voluntarily and unconditionally withdrew its appeal to pursue a judicial remedy. It did not state that it elected the latter course because of uncertainty over the Board's jurisdiction, and did not request the Board to stay its proceedings until the jurisdictional issue was resolved. Nor did it indicate that if the Court of Federal Claims suit ultimately were dismissed, it would seek to reinstate its appeal to the Board or that it believed that, if the court suit were dismissed, Rule 28(a)(2) entitled it to reinstate its appeal within three years of its dismissal. There is no claim that any government official advised Bonneville to follow the course it chose. What the record suggests is that Bonneville dismissed its suit because it had decided that it wished to

pursue the alternative remedy of litigation in court rather than before the Board.

Two and one-half years later, after this court had affirmed the Court of Federal Claims' dismissal of Bonneville's action as barred by election of remedies, Bonneville attempted to reinstate its appeal to the Board. The Board declined to permit it to do so, ruling that the voluntary dismissal without prejudice had terminated the earlier litigation, and that Bonneville was attempting to file a new suit on which the statute of limitations had long since run. Bonneville's basic position — that it mistakenly voluntarily dismissed its appeal rather than seeking a stay of the Board proceedings on the erroneous assumption that it had the right to reinstate the appeal at any time within three years — is comparable to the "garden variety claim of excusable neglect" that the Court in *Irwin* held was insufficient to justify equitable tolling. Bonneville has not established a basis for equitable tolling.

The present case thus is unlike *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998), in which this court en banc recently held that equitable tolling is available to avoid time limitations in the statutory provisions governing veterans benefits. We ruled that Bailey had sufficiently alleged a claim for equitable tolling based on what he had been told by government officials: "Given the particular relationship between veterans and the government, Bailey was misled by the conduct of his adversary into allowing the filing deadline to pass. *Id.* at 1365. Although there is no suggestion of misconduct, such as tricking Bailey into missing the 120 day filing deadline, we nevertheless conclude that a veteran's inducement by an adversary's conduct is akin to grounds

sufficient to toll a limitations period in a private suit." The court, however, did not hold that the limitations period should be equitably tolled in Bailey's case, but merely remanded the case to the Court of Veterans Appeals to determine that question, and indicated no view on the applicability of the doctrine to the different statutory provision in this case. *Id.* at 1368.

CONCLUSION

The order of the Board refusing to reinstate Bonneville's appeal is

AFFIRMED.

Appendix A

United States Court of Appeals for the Federal Circuit

96-1325

BONNEVILLE ASSOCIATES, LIMITED PARTNERSHIP, and MACHAN HAMPSHIRE PROPERTIES, LTD,

Appellants,

v.

DAVID J. BARRAM, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION,

Appellee.

GAJARSA, *Circuit Judge*, concurring.

While I agree with the outcome of this case, I write separately to address two issues: first, the majority opinion's discussion of equitable tolling with respect to the Contract Disputes Act (CDA), 41 U.S.C. § 601 et seq. (1994), in light of our recent in banc opinion in *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998) (in banc), and, second, what I perceive to be an incomplete analysis of the Board's rules in effect at the time and their relationship to the jurisdiction conferred on the Board by the CDA.

Equitable Tolling

The majority's Part III discussion of equitable tolling of the CDA in light of *Irwin v. Department of Veterans Affairs*,

498 U.S. 89 (1990), distinguishes our recent in banc decision in *Bailey* on the basis that *Bailey* involved the paternalistic statutory provisions governing veterans benefits, in contrast to the statute of limitations provision of the CDA at issue here.

The majority opinion states that "[t]his court has not decided whether equitable tolling applies to the time limitations in the Contract Disputes Act for challenging a contracting officer's decision. We find it unnecessary to decide that issue, here, however, for even if the doctrine applies, equitable tolling of the 90-day time limitation is unwarranted." Slip op. at 10 (internal citations omitted). The opinion then goes on to discuss equitable tolling under *Irwin* as if the presumption applied to the CDA, holding that Bonneville's situation is nothing more than a "garden variety claim of excusable neglect" and is thus "insufficient to justify equitable tolling." Slip op. at 12 (citing *Irwin*, 498 U.S. at 96).

However, any discussion by the majority of *Irwin* and the applicability of equitable tolling to the CDA must be viewed as dicta. Although that issue was squarely presented to us, the majority opinion does not hold that the presumption in favor of equitable tolling outlined in *Irwin* and refined by us in *Bailey* does not apply to the CDA.[1] That issue remains to be decided in the future. In addition, the majority opinion's basis for distinguishing *Bailey*, *i.e.*, a paternalistic veterans

1. I note in passing that as a "timing for review" provision, the CDA statute of limitations provision at issue here would be precluded from any application of equitable tolling under the view espoused by Judge Bryson in his dissent in *Bailey*.

scheme, should not be read to imply that any statutory scheme not involving veterans is precluded from the possibility of equitable tolling. That the discussion of *Irwin* in *Bailey* was in the context of veterans does not diminish the precedential and controlling nature of the in banc court's discussion. Thus, I do not criticize the majority's ultimate conclusion as to equitable tolling given the particular facts of this case. Rather, I write separately to emphasize what has not been decided, namely, whether the presumption of equitable tolling announced by the Supreme Court in *Irwin*, as refined by the in banc court in *Bailey*, applies to the CDA.

Board's Rules and the CDA

In Part II, the majority opinion correctly determined that Bonneville's dismissal without prejudice pursuant to Rule 28(a)(1) prevented it from reopening its appeal with the Board pursuant to the three-year reinstatement provision of Rule 28(a)(2). The majority states that Rule 28(a)(2) "merely places an outer limit on the time within which a litigant may seek to reinstate an appeal that was dismissed without prejudice." Slip op. at 8. In addition, the majority states that a dismissal without prejudice pursuant to Rule 27(c) "cover[s] situations where the suspension was likely to continue for a lengthy but indefinite time, such as the conduct of settlement negotiations." Slip op. at 6. In concluding that Bonneville cannot resort to Rule 28(a)(2) to reinstate its appeal with the Board, the majority opinion relies on the deference we give to the Board's interpretation of its own rules and procedures. While I do not dispute that point, I am troubled by the lack of discussion of the necessary corollary to that proposition, namely, the Board's inability to construe its own rules

pursuant to the CDA to enlarge its own jurisdiction. This issue was addressed in the Board's opinion and in the parties' briefs to this court on appeal.

We have stated repeatedly that "waiver of sovereign immunity by the United States is jurisdictional." *RHI Holdings, Inc. v. United States*, 142 F.3d 1459, 1461 (Fed. Cir. 1998) (citing *United States v. Sherwood*, 312 U.S. 584, 589-90 (1941)). A sovereign's consent to be sued pursuant to the CDA must be strictly construed. *See Cosmic Constr. Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982) (citing *Soriano v. United States*, 352 U.S. 270 (1957)). However, "authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge its jurisdiction." *Widdoss v. Secretary of the Dep't of Health and Human Servs.*, 989 F.2d 1170, 1177 (Fed. Cir. 1993) (quoting *Sherwood*, 312 U.S. at 589-90). Given this clear line of precedent, I do not understand why the majority preferred to rely only on the deference we give the Board in interpreting its own rules to support its holding, without taking the next step, *i.e.*, that the Board cannot construe the statute of limitations provision of the CDA (41 U.S.C. § 606) to enlarge its jurisdiction, as that would impermissibly violate principles of sovereign immunity.

Additionally, I do not understand the majority opinion's lack of discussion of Rule 27(c)'s explicit reference to "reinstatement" and its directive that dismissals pursuant to this rule are "subject to the provisions of [Rule 28(a)]," and the corresponding lack of a similar reference and directive in Rule 28(a)(1). While it is true that the dismissal in this case was granted pursuant to Rule 28(a)(1) and not Rule 27(c),

the marked difference in language of the two rules is certainly relevant to the present case and reinforces our ultimate conclusion of not permitting reinstatement after dismissal pursuant to Rule 28(a)(1).

For the reasons stated above, I cannot join the majority opinion and must concur only in the judgment.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED AND FILED JANUARY 20, 1999

United States Court of Appeals for the Federal Circuit

96-1325

BONNEVILLE ASSOCIATES, LIMITED PARTNERSHIP, and MACHAN HAMPSHIRE PROPERTIES, LTD,

Appellants,

v.

DAVID J. BARRAM, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION,

Appellee.

Judgment

ON APPEAL from the General Services Administration Board of Contract Appeals

in CASE NO(S). 13134

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Appendix B

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED JAN 20 1999

s/ Jan Horbaly
Jan Horbaly, Clerk

ISSUED AS A MANDATE: MARCH 15, 1999

COSTS AGAINST APPELLANTS:

Printing:	$262.24
TOTAL:	$262.24

APPENDIX C — OPINION OF THE BOARD OF CONTRACT APPEALS DATED DECEMBER 22, 1995

Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

DISMISSED FOR LACK OF JURISDICTION:
December 22, 1995

GSBCA 13134(11595)-REIN

BONNEVILLE ASSOCIATES, LIMITED PARTNERSHIP & MACHAN HAMPSHIRE PROPERTIES, LTD.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

* * *

Before Board Judges **DANIELS** (Chairman), **NEILL**, and **HYATT**.

HYATT, Board Judge.

This appeal challenges a contracting officer's decision demanding payment of $5,195,069 in connection with a contract under which Bonneville Associates, Limited Partnership sold a building to the General Services

Administration (GSA) and agreed to perform certain repairs and alterations to the building. The underlying dispute between the parties arises from an alleged breach by Bonneville of the purchase agreement's warranty of structural integrity and from the failure to perform repairs as, required. GSA has filed a motion to dismiss Bonneville's appeal for lack of jurisdiction. For the reasons stated below, we grant the motion.

Background

On September 30, 1987, Bonneville and GSA entered into a contract under which GSA purchased an office building in Las Vegas, Nevada, from Bonneville. The contract obligated Bonneville to make substantial repairs and alterations to the building to render it suitable for government use. Controversies concerning the repairs and alterations arose between the parties after the Government took title to the building. For the most part, these disputes focused on the floor load capacity of the building and the operation of the heating, ventilation, and air conditioning (HVAC) units. *See Bonneville Associates v. United States*, 43 F.3d 649, 651 (Fed. Cir. 1994).

After four years of unsuccessful settlement negotiations, the GSA contracting officer issued a decision, on August 21, 1991, demanding $5,195,069 from Bonneville for the cost of correcting the structural defects and remedying the deficiencies in the HVAC units. That decision notified Bonneville of its right to appeal either to the General Services Administration Board of Contract Appeals within ninety days, or to the United States Claims Court (now the United States

Court of Federal Claims) within twelve months. Appeal File, Exhibit 42.

On November 19, 1991, ninety days after receipt of the contracting officer's decision, Bonneville filed a timely notice of appeal at the Board. Bonneville then filed a motion to withdraw its appeal on January 8, 1992. Respondent did not oppose the motion and on January 17, 1992, the Board, pursuant to its Rule 28(a)(1), providing for the voluntary dismissal of pending actions, dismissed the appeal without prejudice.

Bonneville filed a complaint, challenging the same decision of the contracting officer, in the United States Claims Court on January 13, 1992. The Government moved to dismiss Bonneville's complaint for lack of subject matter jurisdiction, arguing that under the judicially-created "election doctrine" Bonneville's prior appeal to the Board was a binding choice of forum that deprived the court of jurisdiction. Bonneville countered that the primary purpose of the contract was the Government's procurement of real property and, therefore, that the transaction was excluded from the Board's jurisdiction under the Contract Disputes Act of 1978 ("CDA").[1] *See* 41 U.S.C. § 602(a)(1) (Supp. V 1993) (contracts for the "procurement of . . . real property" are exempt from the CDA). Bonneville argued that, because the Board lacked jurisdiction, the election doctrine did not apply.

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1. Pub.L. No. 95-563, 92 Stat. 2383, codified as amended at 41 U.S.C. §§ 601-613 (1988 & Supp. V 1993).

Appendix C

On November 22, 1993, the Court of Federal Claims determined that the Board did have subject matter jurisdiction over Bonneville's claim because the dispute arose under the repair clause of the dual purpose contract, which was governed by the CDA. *Bonneville Associates v. United States*, 30 Fed. Cl. 85, 88 (1993) (citing *Forman v. United States*, 767 F.2d 875, 879 (Fed. Cir. 1985) (board of contract appeals has jurisdiction over dual-purpose contract for the construction and lease of real property)). The court thus concluded that the election doctrine required dismissal of the case without prejudice for lack of subject matter jurisdiction. 30 Fed. Cl. at 87-89.

Bonneville appealed this decision to the United States Court of Appeals for the Federal Circuit. On December 19, 1994, the Court of Appeals affirmed the lower court's decision, holding that the Board did have jurisdiction over Bonneville's appeal and that the Court of Federal Claims had correctly applied the election doctrine to dismiss Bonneville's action for lack of subject matter jurisdiction. *Bonneville Associates v. United States*, 43 F.3d 649 (Fed. Cir. 1994).[2]

Following the issuance of the Federal Circuit's, decision, Bonneville on December 29, 1994, sought to reinstate its appeal at the Board pursuant to Rule 28(a)(2). At the time

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2. Bonneville states that the Court of Federal Claims, during oral argument, asked the Government whether the Board would retain jurisdiction to hear the appeal should the court dismiss the case. The Government's response was noncommittal. According to Bonneville, a similar inquiry was made by the Court of Appeals. Regardless, the interest expressed by these courts in the context of oral arguments does not confer jurisdiction upon the Board.

Appendix C

Bonneville's appeal was dismissed in 1992, this provision stated that a case dismissed without prejudice, and not reinstated within three years or a shorter-prescribed period from the date of the dismissal, would be deemed dismissed with prejudice at the conclusion of the applicable period. 48 CFR 6101.28(a)(2) (1991).

Discussion

GSA has moved to dismiss Bonneville's "reinstated" appeal as time-barred under the CDA's ninety-day time limit for bringing an appeal to the Board. It is GSA's contention that the Board's Rule 28, governing voluntary dismissals of cases, cannot be construed to permit Bonneville to pursue its appeal at this point in time. Rather, GSA maintains, the Board's order dated January 17, 1992, dismissing Bonneville's appeal without prejudice, operated in much the same manner as a dismissal under Federal Rule of Civil Procedure, (FRCP) 41(a),[3] which places the parties in the

3. FRCP 41(a) provides:

(a) Voluntary Dismissal:

(1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of the court (i) by filing notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a

(Cont'd)

same position as if the action had never been brought. As such, GSA argues that the use of Rule 28(a)(2) to reinstate this appeal contravenes the ninety-day appeal period established under the CDA.[4] In support of its position, GSA

(Cont'd)

> notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or any state an action based on or including the same claim.
>
> (2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for the independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

4. The Contract Disputes Act, at 41 U.S.C. § 605(h), provides:

> Decision by the contracting officer . . .
>
> (b) The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this Act. Nothing in this Act shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action,

(Cont'd)

cites *Inslaw, Inc.*, DOTBCA 1609 et al., 92-1 ¶ 24,550, at 122, 501-02, which, in dicta, suggested the possible invalidity of a similar Department of Transportation Board of Contract Appeals rule which, like the GSBCA rule relied upon by appellant, provided that actions dismissed without prejudice may be reinstated within three years. In sum, GSA asserts that Bonneville's December 29, 1994 filing is effectively a new appeal and is thus untimely under the CDA.

In response to the Government's motion to dismiss, Bonneville maintains that a dismissal without prejudice pursuant to Rule 28(a)(2) does not have the same effect as a voluntary dismissal under the FRCP 41(a). Bonneville asserts that, in this case, the dismissal without prejudice is analogous to a suspension of proceedings and that the Board retains jurisdiction until a specific time has elapsed, at which time the dismissal converts to a dismissal with prejudice.

(Cont'd)

> or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

41 U.S.C. § 606 provides:

> Contractor's right of appeal to board of contract of appeals
>
> Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title.

Therefore, Bonneville argues, its second filing on December 29, 1994 related back to the date of the first filing and should not be deemed untimely under the CDA.

The arguments of the parties are best understood in light of the historical development of these procedural rules. Before 1985, the GSBCA Rules of Procedure regarding dismissals without prejudice (then Rule 30) provided that a judge could dismiss an appeal without prejudice where it appeared that a case would be in suspense status for an inordinate length of time. 41 CFR 5A-60.101 (1975) (Rule 30). Often, such dismissals were granted to accommodate parties' settlement efforts. Because the circumstances requiring this prolonged suspense status could sometimes take years to resolve, the Rule also provided for up to three years during which an appeal could be reinstated.[5] The term "dismissal without

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5. From 1975 to 1984, the Board's then Rule 30, Dismissal Without Prejudice, provided:

> In certain cases, appeals docketed before the Board are required to be placed in a suspense status and the Board is unable to proceed with disposition thereof for reasons not within the control of the Board. In any such case where the suspension has continued, or it appears that it will continue, for an inordinate length of time, the Board may in its discretion dismiss such appeals from its docket without prejudice to their restoration when the cause of suspension has been removed. Unless either party or the Board acts within three years to reinstate any appeal dismissed without prejudice, the dismissal will be deemed with prejudice.

41 CFR 5A-60.101 (1975).

prejudice" was not intended to be used in the same manner as the term is often used under FRCP 41(a) —Voluntary Dismissal — treating the action "as if it had never been brought." *Humphreys v. United States*, 272 F.2d 411, 412 (9th Cir. 1959). Rather, it was intended that the case would be "reinstated" to the same procedural posture as if the dismissal had never occurred.[6] *See, e.g., University Research Corp.*, GSBCA 9079, 88-2 BCA ¶ 20,718, at 104,684 (although the Board declined to reinstate appeal when appellant filed motion for reinstatement after the expiration of three years from the date of the dismissal without prejudice, its prior order had stated: "Pending settlement, all proceedings in the appeals have been suspended. In these circumstances, it is appropriate to dismiss these appeals but to allow reinstatement if settlement should not be effected." *University Research Corp.*, GSBCA 6279-ED, 1983 WL 13196); *Dawson Construction Co.*, GSBCA 5550, 1981 WL 7475 (Sept. 30, 1981) (dismissing appeal without prejudice subject to reinstatement within ninety days should the parties' settlement agreement not be consummated).

In 1985, the GSBCA Rules of Procedure were amended. Former Rule 30 was divided into two rules, renumbered as Rule 27(c) — Dismissal in Lieu of Stay or Suspension, and Rule 28(a) — Voluntary Dismissal. 48 CFR 6101.27, 6101.28 (1985). Rule 28(a) under the 1985 Rules was worded to closely resemble FRCP 41(a) — Voluntary Dismissals. *See International Business Machines Corp.*, GSBCA 8834-P,

6. *Black's Law Dictionary* states that "to reinstate a case" means "[t]o place again in same position as before dismissal." *Black's Law Dictionary* 1287 (6th ed. 1990) (citing *United States v. Green*, 107 F.2d 19, 22 (9th Cir. 1939)).

Appendix C

1987 WL 40647 (Feb. 12, 1987) (acknowledging that Rule 28(a)(2) is based upon FRCP 41).

The 1985 versions of GSBCA Rules 27(c) and 28(a) provide in pertinent part:

6101.27 (Rule 27)

. . . .

(c) *Dismissal in lieu of stay or suspension.* When circumstances beyond the control of the Board prevent the continuation of proceedings in a case, the Board may in lieu of issuing an order suspending proceedings, dismiss the case without prejudice to reinstatement. Such a dismissal may require reinstatement by a date certain or within a certain period of time after the occurrence of a specified event. If the order of dismissal does not otherwise provide, it will be subject to the provisions of 6101.28(a) [Rule 28].

(a) *Voluntary dismissal.* (1) Upon motion of the appellant or by stipulation of the parties, a case may be dismissed by the Board. Unless otherwise stated in the appellant's motion or in the stipulation, the dismissal is without prejudice, except that such dismissal operates as an adjudication upon the merits when requested by an appellant whose case based on or including the same claim has previously been dismissed by the Board. (2) When a case has been dismissed without prejudice and has not been reinstated by

> the Board upon application of any party within three years of the date of dismissal, or within such shorter period as the Board may prescribe, the case shall be deemed to have been dismissed with prejudice as of the expiration of the applicable period.

48 CFR 6101.27, 6101.28 (1985).[7]

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7. In 1994, the Board amended Rule 28 — Dismissals — to its present form:

> (a) *Generally.* A case may be dismissed by the Board on motion of any party. A case may also be dismissed for reasons cited by the Board in a show cause order to which response has been permitted. Every dismissal shall be with prejudice to reinstatement of the case unless a dismissal without prejudice has been requested by a party or specified in a show cause order.
>
> (b) *Dismissal without Prejudice.* When a case has been dismissed without prejudice to its reinstatement and no party has requested, within the period specified in this paragraph, that the case be reinstated, the case shall be deemed to have been dismissed with prejudice as of the expiration of 10 working days of the date of dismissal in a protest, 180 calendar days of the date of dismissal in any other kind of case, or such other period as the Board may prescribe.
>
> (c) *Issuance of order.* An order of dismissal shall be issued by the panel of judges to which the case has been assigned if the motion is contested or if the Board is acting consequent to its own show cause order. An order of dismissal may be issued by the panel chairman alone if the motion to dismiss is not contested.

48 CFR 6101.28 (1994).

Appendix C

Unlike previous versions of the Rules, the 1985 and subsequent revisions contemplate dismissals not only when the Board wishes to remove the case from suspense status or to accommodate settlement negotiations or unusual extenuating circumstances, but also when the appellant no longer intends to pursue the action at the Board. The latter is the common understanding of a "voluntary dismissal without prejudice" as used in FRCP 41.

Bonneville argues that, in this instance, the dismissal without prejudice was not analogous to FRCP 41(a), but is analogous to a suspension of proceedings because the order contemplated the reinstatement of the appeal. This contention is unconvincing. The order itself merely dismissed the appeal — it was silent as to reinstatement. Bonneville requested that its appeal be dismissed in order that it might file the identical suit in the United States Claims Court (Court of Federal Claims). Bonneville then proceeded to argue in the Court of Federal Claims and at the Court of Appeals for the Federal Circuit, in opposition to the Government's motion to dismiss, that this Board did not have jurisdiction over its appeal in the first instance. *Bonneville Associates v. United States*, 30 Fed. Cl. 85 (1993) and *Bonneville Associates v. United States*, 43 F.3d 649 (Fed. Cir. 1994). At the time Bonneville moved to withdraw the appeal, issue had not yet been joined. As a practical matter, there were no proceedings to be stayed. Thus, Bonneville's request to dismiss its appeal without prejudice had the same effect as a dismissal without prejudice under Rule 41(a) of the Federal Rules of Civil Procedure — to remove the appeal from the Board completely.

Appendix C

Where the term "dismissal without prejudice" is being used in the same manner as it is used in FRCP 41(a) — Voluntary dismissals, it is appropriate to consider cases construing FRCP 41(a) to determine the effect of such dismissals. *See Computer Dynamics, Inc.*, GSBCA 10288-P(10209-P), 90-1 BCA ¶ 22,328, at 112,222, 1989 BPD ¶ 294 ("[R]ule [28(a)(2)] has much in common with Rule 41(a) of the Federal Rules of Civil Procedure — rules to which we look for guidance in interpreting our own rules."). As stated in *Computer Dynamics*: "Under F.R.C.P. 41(a), '[a] voluntary dismissal without prejudice leaves the situation as if the action had never been filed. After a dismissal the action is no longer pending in the court and no further proceedings in the action are proper.' " *Id.*, citing *Long v. Board of Pardons and Paroles of Texas*, 725 F.2d 306, 307 (5th Cir. 1984). *Accord Curtis v. United Transportation Union*, 648 F.2d 492, 495 (8th Cir. 1981) ("Rule 54 (b) does not provide an exception . . . to the rule that the entry of voluntary dismissal without prejudice leaves the action as if the suit had never been brought for purposes of the statute of limitations."); *Bomer v. Ribicoff*, 304 F.2d 427, 428 (6th Cir. 1962) (an action dismissed without prejudice leaves the situation as if the suit had never been brought); *Humphreys v. United States*, 272 F.2d 411, 412 (9th Cir. 1959) ("suit dismissed without prejudice pursuant to Rule 41(a)(2) leaves the situation the same as if the suit had never been brought.").

Bomer v. Ribicoff, 304 F.2d 427 (6th Cir. 1962), involving an appellant's attempt to refile an appeal which was dismissed without prejudice after the expiration of a statutory time limit, is particularly on point. In *Bomer*, the appellant had timely filed an action in United States District Court seeking review

of a Hearing Examiner's denial of appellant's claim for increased benefits under the Social Security Act. Several months later, the *Bomer* appellant filed a motion to dismiss the complaint without prejudice. Nearly a year later, the appellant filed the same action for administrative review of the Hearing Examiner's ruling in the same district court. The Government moved to dismiss the action, arguing that the appellant failed to commence the action within the sixty day period after notice of the final decision of August 4, 1959, as required by 42 U.S.C. § 405. *Id.* at 428. Invoking the general rule that "[a]n action dismissed without prejudice leaves the situation the same as if the suit had never been brought," the court agreed that the action had to be dismissed. The court explained that where the right of action sought to be enforced is one created by statute and is limited by the provisions of the statute as to the time within which the right must be asserted, such conditions operate as a condition of liability rather than as a period of limitation and there can be no recovery unless the condition precedent is fulfilled. *Id.* at 429. As a result, the court held that "not having filed the present action to review the adverse administrative ruling within the sixty days provided by statute, the right provided by statute ceased to exist, and the present action was properly dismissed." *Id.*

Like the appellant in *Bomer*, Bonneville here attempts to refile an appeal which was dismissed without prejudice after the expiration of a statutory time limit. Our appellate authority has made clear that the ninety-day statutory filing period provided in the CDA is jurisdictional and, like the sixty-day limit in *Bomer*, must be strictly construed. *See Cosmic Construction Co. v. United States*, 697 F.2d 1389,

1390 (Fed. Cir. 1982) (Armed Services Board of Contract Appeals lacked jurisdiction to waive the ninety-day period provided for in 41 U.S.C. § 606). Additionally, it is well settled that" '[a]n authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge its jurisdiction.' " *Widdoss v. Secretary of the Department of Health and Human Services*, 989 F.2d 1170, 1177 (Fed. Cir. 1993), *cert. denied*, 114 S.Ct. 381, (citing *United States v. Sherwood*, 312 U.S. 584, 589-90 (1941)). Thus, a court or board "cannot, by rule or order, create exceptions to or otherwise waive or extend a limitations period established by statute. The terms of the Sovereign's consent to suit have long been considered jurisdictional." *White Buffalo Construction, Inc. v. United States*, 28 Fed. Cl. 145, 146 (1992). Therefore, the Board is not at liberty to construe Rule 28(a)(2) in such a way as to toll, extend, or waive the time period established by the CDA in which to appeal the decision of the contracting officer.

Accordingly, because Bonneville voluntarily caused its appeal to be dismissed without prejudice in order to pursue the appeal in another forum, Bonneville is placed in the same position as if the first appeal had never been filed. The second filing does not relate back to the date of the first filing. Moreover, as the second complaint filed on December 29, 1994 is a "new appeal" filed after the expiration of the CDA ninety-day time limit, it is untimely. We lack jurisdiction to hear this appeal.

Appendix C

Decision

For the reasons stated, respondent's motion to dismiss is **GRANTED.** Appellant's appeal is **DISMISSED WITHOUT PREJUDICE** for lack of jurisdiction.

s/ Catherine B. Hyatt
CATHERINE B. HYATT
Board Judge

I concur:

s/ Edwin B. Neill
EDWIN B. NEILL
Board Judge

DANIELS, Board Judge, dissenting.

It must have been a decision like this one that caused Dickens's Mr. Bumble to say, "If the law supposes that, the law is a ass." C. Dickens, *Oliver Twist* at 520 (1943 Dodd, Mead & Co. ed.).

The majority finds that the Board lacks jurisdiction to hear this case on the basis of a very limited set of facts. According to my colleagues, all we need to know to resolve this motion is the following: On August 21, 1991, a GSA contracting officer issued a decision asserting a claim under a contract between GSA and Bonneville. The decision informed Bonneville that review by an impartial adjudicator could be had if the contractor filed an appeal with this Board within ninety days or brought a direct action in the United

States Claims Court within twelve months. Bonneville timely appealed the decision to the Board on November 19, 1991. The contractor moved to withdraw this case shortly thereafter, and on January 17, 1992, the Board dismissed the case without prejudice. Nearly three years later, on December 29, 1994, Bonneville moved to reinstate the appeal.

The majority holds that the controlling principle in this case is that "a voluntary dismissal without prejudice leaves the situation as if the action had never been filed. After a dismissal the action is no longer pending in the court." *Computer Dynamics, Inc.*, GSBCA 10288-P (10209-P), 90-1 BCA ¶ 22,328, at 112,222, 1989 BPD ¶ 294, at 3 (citing *Long v. Board of Pardons & Paroles of Texas*, 725 F.2d 306, 307 (5th Cir. 1984)). The filing of the motion for reinstatement was consequently, according to the majority, in effect the filing of the appeal for the first time. Because the Contract Disputes Act authorizes a contractor to appeal a contracting officer's decision to a board of contract appeals only if the appeal is filed within ninety days of the contractor's receipt of the decision, 41 U.S.C. § 606 (1988), and the ninety-day filing period is jurisdictional and must be strictly construed, *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982), my colleagues conclude that this case was filed much too late for us to consider it.

This position is built on a legal fiction — that Bonneville never brought this case to us before it filed its motion for reinstatement. Such fictions are supposed to be founded in equity, and are wrongful if they work loss or injury to anyone. *Louisville & Nashville R. Co. v. Public Service Comm'n of Tennessee*, 389 F.2d 247, 250 n.1 (citing 3 William

Blackstone, *Commentaries* 1553 (W. C. Jones ed.)); *Black's Law Dictionary* at 561 (5th ed. 1979) ("fictio legis inique operatur alicui damnum vel injuriam"). Legal fictions "are a clumsy device appropriate only to periods of growth in a partially developed political organization of society in which legislation on any large scale is not possible. . . . In a sense they were devised to conceal the substance when the substance was not regarded as of legal consequence." R. Pound, 3 *Jurisprudence*, 465-66 (1949) (cited in *Louisville & Nashville R. Co.*, 389 F.2d at 250 n.1).

A legal fiction should consequently not be applied mechanically. *Costello v. Immigration & Naturalization Service*, 376 U.S. 120, 130 (1964). Rather than following a fiction, a tribunal should "bring [its] analytical framework into conformity with practical realities." *Hughes v. Oklahoma*, 441 U.S. 322, 335 (1979). In particular, a fiction "cannot be indulged [where] it is negated by the facts." *Parsons v. Smith*, 359 U.S. 215 (1959); *see also Faretta v. California*, 422 U.S. 806, 821 (1975).

The majority mentions, but does not recognize the importance of, some facts which are fundamental to this case. I set them out here.

Bonneville moved the Board on January 8, 1992, to have its appeal dismissed without prejudice. We granted the motion pursuant to Board Rule 28(a). Our order did not prescribe a period of time within which the case could be reinstated. At the time, Rule 28(a) provided:

Appendix C

> When a case has been dismissed without prejudice and has not been reinstated by the Board upon application of any party within three years of the date of dismissal, or within such shorter period as the Board may prescribe, the case shall be deemed to have been dismissed with prejudice as of the expiration of the applicable period.

48 CFR 6101.28(a)(2) (1991).

On January 13, 1992 — even before the Board dismissed the case which had been pending here — Bonneville filed suit in the Claims Court, appealing the same contracting officer decision. This date was well within the twelve months statute gave Bonneville for filing at the Claims Court. The contractor was concerned that the Board had never had jurisdiction over its challenge to the decision, since the Board's authority derives from the Contract Disputes Act of 1978 and contracts for the "procurement of . . . real property" are exempt from that Act. *See* 41 U.S.C. § 602(a)(1) (1988).

On November 22, 1993, the Court of Federal Claims[1] determined that because the contract involved repairs and improvements to real property, and the dispute implicated only those matters, the Board had jurisdiction over the appeal filed with us. *Bonneville Associates v. United States*, 30 Fed. Cl. 85, 88 (1993) (citing *Forman v. United States*, 767 F.2d 875, 879 (Fed. Cir. 1985) (boards of contract appeals have

1. The United States Claims Court was renamed the Court of Federal Claims, effective October 29, 1992. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902(a), 106 Stat. 4506, 4516 (1992).

jurisdiction over contracts with dual purpose of construction and lease of real property), 41 U.S.C. § 602(a)(3) (Contract Disputes Act applies to contracts for the "procurement of construction, alteration, repair or maintenance of real property")). Under the "election doctrine," Bonneville's appeal to the Board was a binding choice of forum that deprived the court of jurisdiction. The court consequently dismissed the suit Bonneville had brought to it. 30 Fed. Cl. at 89-90.

Bonneville persisted in its belief that the Board never had jurisdiction over the case it had filed here. It appealed the decision of the Court of Federal Claims to the Court of Appeals for the Federal Circuit. On December 19, 1994, the Court of Appeals affirmed, expressly finding that the contract was, "in substantial part, one for the 'procurement of . . . alteration [and] repair' of real property," and thus "within the board's jurisdiction under § 602(a)(3)." *Bonneville Associates v. United States*, 43 F.3d 649, 655 (Fed. Cir. 1994).

Bonneville's motion for reinstatement was filed ten days after the Court of Appeals handed down its decision.

As this history shows, Bonneville has now been told by both the Court of Federal Claims (the Claims Court's current name) and the Court of Appeals, that the Claims Court had no jurisdiction to hear the case because *an appeal had previously been filed at this Board, which had the power to hear it*. If these two courts had been willing to accept the legal fiction that our dismissal without prejudice left Bonneville's appeal as if it had never been made, they would have had to hold that the Claims Court had jurisdiction over

the suit filed there, since that filing would have been the first and only election of forum by the contractor.

Applying the fiction puts Bonneville in a Catch-22 situation: The two courts say the Claims Court had no jurisdiction to get to the merits of the case because the contractor filed here first, but my colleagues say the Board has no jurisdiction because Bonneville effectively never filed here until recently. Thus, the contractor will have no opportunity for review of the merits of the contracting officer's decision, even though it filed with both the Claims Court and the Board within the time limits set out in statute and noted in the decision. The substance of the fiction thus becomes of ultimate consequence, and application of it would cause irreparable injury to the appellant by preventing that party from having the merits of its case heard. A more reasonable solution to this predicament would be to resolve the situation by taking into account the facts that (a) Bonneville did file its notice of appeal with us in a timely fashion and (b) at all relevant times, the contractor has been attempting to litigate its claim before a proper forum.

There are two alternative ways to do this.

The first is to take the dismissal on its own terms. A dismissal without prejudice which contemplates further proceedings does not terminate the litigation. *Peters v. Welsh Development Agency*, 920 F.2d 438 (7th Cir. 1990). "In determining finality a court's analysis must focus on the underlying *effect* of a dismissal." *Sigalas v. Lido Maritime, Inc.*, 776 F.2d 1512, 1516 (11th Cir. 1985). Bonneville clearly asked in 1992 that its appeal to this Board be dismissed so

that it could proceed in a forum which had jurisdiction over the case. Bonneville never sat on its rights; indeed, it filed in the Claims Court (which it believed to be such a forum) even before the case here was dismissed. In finding that Bonneville elected to have the Board hear this case, the courts expressly found that we have jurisdiction to consider it. Our giving effect to the terms of the dismissal order and exercising that jurisdiction will achieve an equitable finality to the litigation. This result is consistent with what the Eleventh Circuit said in *Sigalas*: Where a plaintiff is sent to another forum and later forced to return to the original forum, that party should "be heard even if the statute of limitations has already tolled in the original court." 776 F.2d at 1516.

Even if this reasoning is thought to founder on the ninety-day statute of limitations for appealing a contracting officer's decision to a board of contract appeals, we could deny the Government's motion to dismiss on a different ground. Where a tribunal desists from hearing a case in order to permit a similar case to proceed in another tribunal, a stay of proceedings, not a dismissal, is the appropriate procedural mechanism to employ. *Rosser v. Chrysler Corp.*, 864 F.2d 1299, 1308 (7th Cir. 1989) (a dismissal based on abstention of a Federal court so that a state court might hear the case was deemed an abuse of discretion; the case was remanded to the district court, with instructions to enter a stay). A stay avoids any problems which time bars might create; it permits the case to be heard on the merits in the first tribunal if that proves necessary. *Id.* If our earlier dismissal of this case poses an insuperable problem to hearing it, we could convert the dismissal to a stay, *nunc pro tunc*, and then lift that stay so that the case might now be heard. *Board of Education of*

Appendix C

Valley View Community Unit School District No. 365U v. Bosworth, 713 F.2d 1316, 1322 (7th Cir. 1983); *Evans Transportation Co. v. Scullin Steel Co.*, 693 F.2d 715, 717-18 (7th Cir. 1982).

s/ Stephen M. Daniels
STEPHEN M. DANIELS
Board Judge

APPENDIX D — ORDER OF DISMISSAL FROM THE BOARD OF CONTRACT APPEALS DATED JANUARY 17, 1992

Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

ORDERED: January 17, 1992

GSBCA 11595

BONNEVILLE ASSOCIATES, LIMITED PARTNERSHIP & MACHAN HAMPSHIRE PROPERTIES, LTD.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

* * *

Board Judge **HYATT.**

ORDER OF DISMISSAL

On November 19, 1991, Bonneville Associates, Limited Partnership and Machan Hampshire Properties, LTD. appealed a contracting officer's decision asserting a claim on behalf of the General Services Administration (GSA) in the amount of $5.19 million. GSA's claim is premised on

appellant's failure to perform corrective repairs to an office building in Las Vegas, Nevada, which GSA maintains were required under the terms of Contract No. GS-09B-9-88-1.

On January 8, 1992, appellant filed a motion to withdraw the appeal filed at this Board so that it may pursue an appeal in the United States Claims Court instead.

Decision

Accordingly, this appeal is **DISMISSED WITHOUT PREJUDICE.** Rule 28(a)(1).

APPENDIX E — WITHDRAWAL OF NOTICE OF APPEAL DATED AND FILED JANUARY 6, 1992

Martin E. Seneca, Jr.
Attorney for Appellants
Post office Box 2904
Reston, VA 22090
(703)407-3254
D.C. Bar No. 162-487

BOARD OF CONTRACT APPEALS
GENERAL SERVICES ADMINISTRATION
WASHINGTON, DC 20405

GSBCA No. 11595

Appeal of:

BONNEVILLE ASSOCIATES,
LIMITED PARTNERSHIP,

CONTRACT No. GS-09B-88-1

WITHDRAWAL OF NOTICE OF APPEAL

Bonneville Associates, Limited Partnership and Machan Hampshire Properties, LTD., by and through counsel, Martin E. Seneca, Jr., hereby withdraw the Notice of Appeal to the final decision of James A. Hines issued on August 21, 1991 and received on August 26, 1991. Bonneville Associates et al. will pursue its appeal in the U.S. Claims Court.

Appendix E

Dated this 6th day of January, 1992.

Respectfully submitted,

s/ Martin E. Seneca, Jr.
Martin E. Seneca, Jr.
Attorney for Appellants

CERTIFICATION

I hereby certify that a true and correct copy of this Withdrawal of Appeal was sent, postage prepaid, to Robert C. MacKichan, Jr., Esq., General Counsel, GSA, 18th & F Streets, N.W., Washington, DC 20405 on the 6th day of January, 1992.

s/ Martin E. Seneca, Jr.
Martin E. Seneca, Jr.

APPENDIX F — NOTICE OF APPEAL DATED AND FILED NOVEMBER 19, 1991

Martin E. Seneca, Jr.
Attorney for Appellants
Post office Box 2904
Reston, VA 22090
(703) 407-3254
D.C. Bar No. 162-487

BOARD OF CONTRACT APPEALS
GENERAL SERVICES ADMINISTRATION
WASHINGTON DC 20405

GSBA No. 11595

IN THE MATTER OF:

BONNEVILLE ASSOCIATES,
LIMITED PARTNERSHIP,

CONTRACT No. GS-09B-88-1

NOTICE OF APPEAL

Bonneville Associates, Limited Partnership and Machan Hampshire Properties, LTD., by and through counsel, Martin E. Seneca, Jr., hereby appeal the final decision of James A. Hines issued on August 21, 1991 and received on August 26, 1991. The dispute arises pursuant to that certain Contract No. GS-09B-88-1 which provided for the purchase of an office building in Las Vegas, Nevada by the General Services Administration.

Appendix F

The conduct of the General Services Administration has caused the Appellants grave damage which shall be detailed in the complaint which will be filed pursuant to the Rules of Procedure of the Board of Contract Appeals.

A coy of the Contractor's Final Decision is attached and made a part of this Notice of Appeal by reference.

Dated this 19th day of November, 1991.

Respectfully submitted,

s/ Martin E. Seneca, Jr.
Martin E. Seneca, Jr.
Attorney for Appellants

APPENDIX G — CONTRACTING OFFICERS' FINAL DECISION DATED AUGUST 26, 1991

General Services Administration, Region 9
525 Market Street
San Francisco, CA 94105

SENT CERTIFIED MAIL

Bonneville Associates, Limited Partnership
Mr. John N. Owens
General Partner
Machan Hampshire Properties, LTD.
4001 South 700 East, Suite 100
Salt Lake City, Utah 84107

Re: Contract No. GS-09B-88-1

Dear Mr. Owens:

This letter shall constitute a claim on behalf of the General Services Administration (GSA) totalling $5.19 million dollars. Since September 20, 1988, and most recently January 31, 1991, GSA has repeatedly requested Machan Hampshire Properties Ltd. (MHP) to perform corrective repairs to the building. These corrective repairs are required to bring the building into compliance with the Uniform Building Code (UBC) and to the performance specifications of the purchase agreement.

The claim amount includes the necessary strengthening of the floor load capacity to meet the UBC of 50 lbs. per square foot live load and 20 lbs. per square foot partition load, and leveling the floors to correct the excessive floor deflections.

Appendix G

In addition to the structural floor strengthening and required leveling, MHP agreed by letter dated October 6, 1988, to perform the following requested corrective work. Once again, the items are as follows:

1. Rooftop HVAC:	Provide 2 tons of cooling capacity to the 5th and 6th floors and associated ducting.
2. HVAC Cooling Capacity:	Add an additional 4 tons of cooling capacity on the 5th and 6th floors, and an additional 2 tons on the 4th and 7th floor.
3. Replace Fan Motors:	Replace existing 20HP fan motors with 25HP fan motors.
4. Duct Work Installation:	Insulate all noninsulated horizontal supply ducts on the 4th-7th floors with Type I, Class B-4, 1" thick insulation.
5. Air Damper Controls:	Modify air damper controls on the 4th-7th floors.
6. Acoustical Insulation:	Install appropriate acoustical insulation on the 7th floor.

Appendix G

7. Warranty of Patch: Warranty patching material used on the parking level cracks.

The structural corrective work is required to bring the building in conformance with the Uniform Building Code, and is the responsibility of MHP Ltd. under paragraph 25, Warranty of Specification and Structural Integrity of the purchase agreement.

The General Services Administration has been patient and cooperative to the greatest extent possible. However, MHP's years of inaction must now be construed as an unequivocal repudiation of its contractual responsibilities. It is the determination of the undersigned Contracting Officer that you are hereby indebted to the Government in the amount of $5.19 million dollars derived as follows:

Structural retrofit:	$ 800,000
Temporary build out & relocation expenses:	$ 243,010
Demolition & permanent build out costs:	$3,155,707
Administrative & design services:	$ 785,000
Correct HVAC & other items:	$ 211,352
TOTAL	$5,195,069

This debt is in addition to any other Government claim, demand for payment or debt collection action.

Appendix G

The Government hereby demands payment in the amount of $5,195,069.00. To avoid additional interest penalty and administrative cost as provided for in 31 U.S.C. 3717, 4 CFR Par. 102.13 and the necessity to collect the debt through administrative offset and/or through referral to the Department of Justice, such payment must be remitted within 30 days from the date of this demand to the following address:

General Services Administration
Finance Division (7BC)
819 Taylor Street
Fort Worth, TX 76102

Payments must be made by certified or bank check payable to the "General Services Administration". A copy of this demand letter should accompany your check.
This letter constitutes a Government claim and a demand for payment under 31 U.S.C. 3711(a). If you fail to pay this claim within 30 days, this claim may be collected by administrative offset. You are hereby given notice of the Government's intent to collect this claim by administrative offset if it is not paid in full within 30 days from the date of this demand.

Any amounts not paid within 30 days from the date of this demand shall bear interest from the date of this demand pursuant to 31 U.S.C. 3717. Any amounts not paid within 90 days from the payment due date shall be charged a penalty at the rate of 6 percent per annum from the 31st day following the date of this demand, initially assessed at 1.5 percent with monthly assessments of .5 percent thereafter. Any amounts not paid shall be charged administrative costs which include, but are not limited to: fixed monthly charges, credit report

costs, debt collection agency fees and the cost of preparing a Claims Collection Litigation Report for the Department of Justice.

You are hereby given notice of your rights under 31 U.S.C. 3716 and 4 CFR Part 102.3. Under 31 U.S.C. 3716, you will be given the opportunity to:

a) inspect and copy GSA records related to the claim; and

b) request a review within GSA of the decision of GSA relating to the claim; and

c) request that a written agreement be executed between your firm and GSA concerning repayment of the claim.

You are hereby notified that under Federal Acquisition Regulation 32.610(b)(4), 48 CFR Part 1-32.610(b)(4), the responsible official designated for determining the amount of debt and for its collection is James A. Hines.

This is a final decision of the Contracting Officer. You may appeal this decision to the Board of Contract Appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the Board of Contract Appeals and provide a copy to the Contracting Officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. If the Government has issued a claim for specific monetary

damages, instead of appealing to the Board of Contract Appeals you may bring an action directly in the U.S. Claims Court (except as provided in the Contract Disputes Act of 1978, 41 U.S.C. 603, regarding Maritime Contracts) within 12 months of the date you receive this decision.

If you appeal to the Board of Contract Appeals, you may, solely at your election, proceed under the Board's small claims procedure for claims of $10,000 or less or its accelerated procedure for claims of $50,000 or less.

Sincerely,

s/ James A. Hines
JAMES A. HINES
Contracting Officer
Real Estate Division (9PES-A)
Public Buildings Service

(2)

Supreme Court, U.S.
FILED
JUN 15 1999
CLERK

No. 98-1688

In the Supreme Court of the United States

BONNEVILLE ASSOCIATES, LIMITED PARTNERSHIP, ET AL., PETITIONERS

v.

DAVID J. BARRAM, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
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QUESTION PRESENTED

Whether the attempt of petitioners to reinstitute an appeal to the General Services Board of Contract Appeals was untimely because it was not filed within the 90-day limitations period established under the Contract Disputes Act of 1978, 41 U.S.C. 606.

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In the Supreme Court of the United States

No. 98-1688

BONNEVILLE ASSOCIATES, LIMITED PARTNERSHIP, ET AL., PETITIONERS

v.

DAVID J. BARRAM, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 165 F.3d 1360. The opinion of the General Services Board of Contract Appeals (Pet. App. 22a-44a) is reported at 96-1 B.C.A. (CCH) ¶ 28,122.

JURISDICTION

The judgment of the court of appeals (Pet. App. 20a-21a) was entered on January 20, 1999. The petition for a writ of certiorari was filed on April 20, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601-613, provides two alternatives for a government contractor to appeal a decision of a contracting officer. First, the contractor may appeal to the agency's board of contract appeals within 90 days from the date of receipt of the contracting officer's decision. 41 U.S.C. 606. Alternatively, the contractor may seek review in the United States Court of Federal Claims by filing an action within twelve months from the date of receipt of the decision. 41 U.S.C. 609(a)(1), (3).

2. a. This case involves petitioners' sale to the General Services Administration (GSA) of an office building in Las Vegas, Nevada. Pet. App. 23a. Following the sale, a dispute arose between petitioners and GSA regarding the structural integrity of the building and petitioners' failure to make required repairs and alterations. *Ibid.* After years of negotiations, the contracting officer issued a final decision on August 21, 1991, demanding $5,195,069 to cover the costs of correcting building deficiencies. *Id.* at 23a, 51a-56a. The decision advised petitioners that they could appeal either to the General Services Board of Contract Appeals (GSBCA) within 90 days or to the United States Court of Federal Claims within one year of receipt.[1] *Id.* at 55a-56a.

On November 19, 1991, petitioners submitted a timely notice of appeal to the GSBCA challenging the contracting officer's final decision. Pet. App. 49a-50a.

---

[1] Prior to October 29, 1992, the United States Court of Federal Claims was named the United States Claims Court. See Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902(a), 106 Stat. 4516. For ease of reference, we employ the current name of the court.

On January 8, 1992, however, petitioners filed a "Withdrawal of Notice of Appeal," which stated that they would pursue review of the contracting officer's decision in the Court of Federal Claims. *Id.* at 24a, 47a-48a. The GSBCA granted petitioners' request on January 22, 1992, and dismissed the appeal without prejudice pursuant to GSBCA Rule 28(a)(1), 48 C.F.R. 6101.28(a) (1991). *Id.* at 45a-46a.

b. Meanwhile, on January 13, 1992, petitioners filed a complaint with the Court of Federal Claims. Pet. App. 3a, 24a. The government moved to dismiss the complaint on the ground that petitioners' election to submit a notice of appeal to the GSBCA foreclosed the court from entertaining the complaint. *Ibid.* The court agreed, holding that, because the GSBCA had jurisdiction to entertain petitioners' claims, the doctrine of election of remedies precludes the exercise of jurisdiction by the Court of Federal Claims. *Ibid.*; see *Bonneville Assocs.* v. *United States*, 30 Fed. Cl. 85, 88 (1993).

Petitioners appealed that decision to the Court of Appeals for the Federal Circuit. The Federal Circuit affirmed the dismissal, holding that the election-of-remedies doctrine required petitioners to prosecute their claim in the first tribunal that possessed jurisdiction. Pet. App. 3a-4a; see *Bonneville Assocs.* v. *United States*, 43 F.3d 649, 654-655 (Fed. Cir. 1994). The court of appeals held that, because the GSBCA had properly acquired jurisdiction over petitioners' claims, the election-of-remedies doctrine precluded suit in the Court of Federal Claims. *Ibid.*

3. On December 29, 1994, petitioners filed a notice of appeal seeking to reinstitute their appeal to the GSBCA. Pet. App. 25a. GSA moved to dismiss that appeal, arguing that the previously-dismissed appeal

could not be reinstated after expiration of the 90-day deadline established in the CDA. *Id.* at 26a. Petitioners contended, in response to the government's motion, that their second notice of appeal did not constitute a new action but merely revived their previous appeal, which had been dismissed without prejudice. Petitioners asserted that their second notice of appeal should therefore relate back to the date of their original appeal. *Id.* at 4a-5a. Petitioners relied upon GSBCA Rule 28(a)(2), which provided (at the time their first notice of appeal was filed) that a case dismissed without prejudice shall be deemed to have been dismissed with prejudice if it is not reinstated by the GSBCA within three years of the date of dismissal. *Id.* at 4a; see 48 C.F.R. 6101.28(a) (1991) (Pet. App. 6a). Petitioners claimed that their case should be reinstated because they had sought reinstatement within three years of the original dismissal of their appeal. Pet. App. 4a.

In a divided decision, the Board granted the government's motion to dismiss. Pet. App. 22a-44a. The Board held that a previously dismissed appeal may not be reinstated after the time limitations specified in the CDA have expired—that is, after 90 days from the date of receipt of the contracting officer's final decision. The Board concluded that, because petitioners voluntarily caused their appeal to be dismissed, they were placed in the same position as if the first appeal never had been filed. *Id.* at 36a. The Board therefore concluded that the second filing did not relate back to the date of the first appeal. *Ibid.*

4. The Federal Circuit affirmed the GSBCA's decision. Pet. App. 1a-14a. The court of appeals gave deference to the interpretation by the GSBCA of its own operating rules and procedures, which is to be

"accepted 'unless it is plainly erroneous or inconsistent with regulation.'" *Id.* at 9a (quoting *Data General Corp.* v. *Johnson*, 78 F.3d 1556, 1561 (Fed. Cir. 1996)). The court held that the GSBCA had not erred in interpreting its rules governing "dismissal without prejudice in the same way the federal courts would have treated" a dismissal without prejudice under the similar provisions of Rule 41(a) of the Federal Rules of Civil Procedure (Pet. App. 9a).

The court rejected petitioners' argument that the GSBCA improperly employed a "legal fiction" in concluding that the voluntary withdrawal of the original appeal left the situation as if the action had never been filed. Pet. App. 10a. The court held that, because petitioners' attempt to reinstate their appeal after the 90-day period for filing the appeal had run was untimely, "the Board properly refused to permit reinstatement of the appeal because of lack of jurisdiction to entertain it" (*ibid.*). The court also rejected petitioners' argument that the appeal should be allowed to proceed by equitably tolling the limitations period set forth in the CDA. *Id.* at 10a-14a. The court succinctly explained that "[w]hat happened here falls far short of the situations in which equitable tolling has been applied." *Id.* at 12a.

ARGUMENT

The decision of the court of appeals is correct, does not conflict with the decision of any other court, and is based upon the application of settled legal principles to the specific facts of this case by the appellate court that Congress has entrusted to review CDA disputes. See 28 U.S.C. 1295(a)(3), (10); 41 U.S.C. 609. Further review is therefore not warranted.

1. Contrary to petitioners' contention (Pet. 8), the GSBCA did not employ a "legal fiction" in concluding

that the second notice of appeal was untimely. Instead, the Board simply determined that, because petitioners voluntarily dismissed their original appeal, they could not commence a second, untimely appeal nearly three years later. Pet. App. 33a-36a. The GSBCA noted that the 90-day limitations period for commencing an appeal under the CDA is jurisdictional and must be strictly construed. *Id.* at 35a. The GSBCA further noted that it lacks power, either by rule or order, to waive or extend a limitations period established by statute. *Id.* at 36a.[2]

As the court of appeals explained, petitioners could have protected their right to reinstate their appeal by moving to suspend it pending disposition of their attempted alternative suit in the Court of Federal Claims. Pet. App. 7a. Because they instead dismissed their original appeal, however, the GSBCA properly determined that it lacked jurisdiction to reinstate it after the statutory 90-day period had expired. This fact-specific application of the plain language of the statute of limitations creates no conflict and does not warrant further review.

2. Petitioners contend, in the alternative, that the 90-day limitations period established in the CDA should be equitably tolled. Pet. 10-13. The decision of this Court in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), on which petitioners principally rely, does not support petitioners' argument. Instead, as

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[2] Moreover, as the Federal Circuit correctly held, the then-applicable version of GSBCA Rule 28(a)(2), upon which petitioners rely, did not entitle a party whose appeal was voluntarily dismissed without prejudice to automatic reinstatement of the appeal at any time within three years of the dismissal. Pet. App. 8a. Instead, Rule 28(a)(2) simply set forth "the time and circumstances under which a without prejudice dismissal became one with prejudice." *Ibid.*

this Court emphasized in *Irwin* and in subsequent cases as well, equitable tolling of statutory time limits is inappropriate when "it is inconsistent with the text of the relevant statute." *United States* v. *Beggerly*, 118 S.Ct. 1862, 1868 (1998). See also *United States* v. *Brockamp*, 519 U.S. 347, 352 (1996) (equitable tolling inappropriate when the statute contains specific directions such as "30 days from filing"); *Irwin* v. *Department of Veterans Affairs*, 498 U.S. at 95.

Congress clearly evidenced its intention that the limitations period of the CDA be strictly applied by establishing specific time limits for different categories of appeals from a contracting officer's final decision: 90 days for appeal to the administrative appeals board; one year for appeal to the Court of Federal Claims. 41 U.S.C. 606, 609. Congress manifested its intent not to allow exceptions from these specific periods of limitation by specifying in Section 605(b) of the CDA that "[t]he contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is *timely* commenced as authorized by this chapter." 41 U.S.C. 605(b) (emphasis added).

Petitioners cite no authority for their proposition that "equitable tolling does apply to the Contract Disputes Act" (Pet. 10). The Federal Circuit, however, found it unnecessary to decide that issue because, even assuming the doctrine could apply under this statute, it found equitable tolling to be unwarranted on the facts of this case. Pet. App. 11a. As the court properly held, petitioners' failure to timely prosecute this appeal was not the result of affirmative government misconduct or incorrect legal advice provided by the GSBCA or the contracting officer. On the contrary, petitioners' decision to withdraw their original appeal was based upon

their own erroneous legal analysis of the jurisdiction of the Board. *Id* at 12a.

Petitioners have been represented by counsel throughout these proceedings. This is not a case in which the party asserting equitable tolling is "without any fault or want of diligence or care on his part." *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991). Instead, as correctly stated by the court of appeals, petitioners' mistaken belief that they could voluntarily dismiss, and later reinstate, their appeal was "comparable to the 'garden variety claim of excusable neglect' that the Court in *Irwin* held was insufficient to justify equitable tolling" (Pet. App. 13a (quoting *Irwin* v. *Department of Veterans Affairs*, 498 U.S. at 455)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 98-1688

IN THE

Supreme Court of the United States

BONNEVILLE ASSOCIATES, LIMITED PARTNERSHIP, and MACHAN HAMPSHIRE PROPERTIES, LTD.,

Petitioners,

v.

DAVID J. BARRAM, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY ARGUMENT

Petitioners Bonneville Associates, Limited Partnership and Machan Hampshire Properties Ltd. (Bonneville) respectfully submit that respondent is incorrect in arguing (1) that the General Services Board of Contract Appeals (GSBCA) did not abuse its discretion in refusing to reinstate Bonneville's appeal and (2) that the 90-day statute of limitations provision of the Contract Disputes Act of 1978 (CDA) should not be equitably tolled.

When Bonneville moved to have its appeal to the GSBCA dismissed, it simply asked that it be allowed to withdraw its appeal before the GSBCA in order to pursue an appeal in the United States Claims Court. (App. E at 47a). In granting this request, the GSBCA dismissed the appeal pursuant to GSBCA Rule 28(a)(1) rather than Rule 27(c). (App. D at 45a). The GSBCA, on its own initiative, thus decided to treat Bonneville's request as a voluntary dismissal rather than dismissing the appeal in lieu of stay or suspension and without prejudice to reinstatement. If the GSBCA had dismissed pursuant to Rule 27(c), Bonneville would have had a hearing on the merits.

The GSBCA then compounded its initial error, *i.e.*, dismissing pursuant to Rule 28(a)(1), by deciding that such a dismissal should be treated in the same way the federal courts would have treated a dismissal without prejudice under Rule 41(a) of the Federal Rules of Civil Procedure. (App. A at 9a). The GSBCA did not have to do this, and given the good faith effort by Bonneville to prosecute its appeal in a timely manner and in the proper forum, GSBCA's action was inappropriate.

Respondent argues this is a garden variety case of excusable neglect by Bonneville and therefore the 90-day statute of limitations should be equitably tolled in order to allow for a hearing on the merits. Respondent is incorrect. Bonneville, at all times, prosecuted its appeal in a timely manner; for example, once Bonneville concluded that the United States Claims Court rather than GSBCA was the proper forum, it immediately appealed to that court. The suggestions that Bonneville should have done more, *e.g.*, indicate to the GSBCA that if the Court of Federal Claims' suit ultimately were dismissed, it would seek to reinstate its appeal to the GSBCA (App. A at 12a) reflects the benefit of hindsight. Yes, if Bonneville had to do this again, it would certainly make explicitly clear to the GSBCA that Bonneville was concerned about the issue of GSBCA's jurisdiction and that if the Court of Federal Claims did not take jurisdiction it would be back to GSBCA. However, at the time Bonneville did not believe such explicit statements were necessary given the GSBCA policy of allowing reinstatements within three years of the dismissal.

CONCLUSION

Bonneville therefore respectfully requests that this Court grant its petition for certiorari.

Respectfully submitted,

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